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IN THE
Supreme Court of the United States

October Term, 1966

No. ~~1290~~ 97

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

SUNRAY DX OIL COMPANY,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT.**

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Petitioner, The United Gas Improvement Company, prays that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Tenth Circuit on March 27, 1967, which reversed certain orders of the Federal Power Commission. The Federal Power Commission has filed a Petition seeking review of the same orders. See No. 1227, this Term.

OPINIONS BELOW.

The *per curiam* opinion of the Court of Appeals for the Tenth Circuit is not yet reported. Likewise the opinions and orders of the Federal Power Commission reversed by the Court of Appeals are not yet reported. These have been reproduced as Appendices "A" and "C" of the petition for a writ of certiorari filed by the Solicitor General, on behalf of the Federal Power Commission, in this and certain cognate matters. See No. 1227, this Term.

JURISDICTION.

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 27, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U. S. C. § 717(r)(b).

QUESTIONS PRESENTED.

This case, arising out of the same proceeding as Nos. 1133, 1134 and 1135, this Term, involves certificate applications by independent producers under §7(c) of the Natural Gas Act. The issues before this Court in this case and in No. 1133 *et al.* arise because the Commission, prior to hearing on these applications, issued *ex parte* temporary certificates to producers at the very high prices contained in the producer-pipeline contracts. After the statutory hearing on permanent certification the Commission determined the maximum initial price at which the gas involved could be sold in interstate commerce consistently with the public convenience and necessity. Since this price was lower than the contract price, the Commission, pursuant to the direction of the Court of Appeals for the District of Columbia Circuit and rulings of this Court, determined that portions of the excesses above the lawful price, collected pursuant to *ex parte* temporary certificates, must in equity be refunded by producers in order to afford the consumer a complete bond of protection. On appeal by producers from this order the Court of Appeals, relying on its cognate decision in *Sunray DX Oil Co. v. FPC*, 370 F. 2d 181, *petition for cert. pending*, No. 1133 *et al.*, this Term, vacated the order *per curiam*, holding that the Commission lacked all power to order any refund of unlawful excesses. Therefore the questions presented are:

1. Does § 7 permit the Commission to issue a permanent certificate upon the condition that an applicant refund amounts collected pursuant to *ex parte* temporary certificates above the lawful public convenience and necessity price during the pendency of the determination of such price?

2. Assuming § 7 permits the Commission to so condition permanent certificates, were the conditions reasonable in this case?

STATUTE INVOLVED.

The statutory provisions involved are § 7(c) and (e) of the Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U. S. C. § 717f. The relevant language of these subsections is as follows:

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE.

Sec. 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations:

• • •

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements

of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

• • •

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act, and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

STATEMENT OF THE CASE.

This case involves essentially the same sales of natural gas and the same legal issues dealt with in the Petitions for Writ of Certiorari in Nos. 1133-35, this Term. As set forth in the Petition in No. 1134, Sunray DX Oil Company and the other producers here entered into contracts with various interstate pipelines during a period between October, 1960, and July, 1962, to sell gas from wells located in Texas Railroad District No. 4. The gas involved was resold by the pipelines in interstate commerce. The initial prices proposed for these sales ranged from 15.9¢ per Mcf to 18¢ per Mcf. Instead of waiting for the issuance of permanent certificates, the producers applied for temporary certificates. These applications were made pursuant to that part of § 7(c) of the Natural Gas Act which confers on the Commission the power to "issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate" Universally, as in the present case, the allegations supporting the request for this authority do not cite examples of emergency conditions injuring consumers. Rather, such applications allege the possibility of economic problems for the individual producer itself, such as drainage by adjoining owners, necessity to flare gas or even simply loss of profits.¹

While not using the word "refund," all the temporary certificates issued to the producers here involved contained the following or a similar provision:

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1. The implication of all such allegations is that if the producer did not receive the privilege of the *ex parte* temporary certification he would suffer considerable economic loss. Therefore, far from conferring any "right" on the producer, the certificate constitutes a privilege and *any* benefit over total loss which the producer enjoys under the temporary certificate must be measured against such total loss, not against benefits some other producers may enjoy.

“This acceptance for filing shall not be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any finding or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.” (Joint Appendix in Nos. 1133 *et al.*, this Term, at 190, 192, 194, 196)

These temporary certificates were, during the period involved in the present case, issued by a letter mailed by the Secretary of the Commission to the producer applicant. No public notice was given in the Federal Register or by other means which would enable a consumer representative as a practical matter to learn of the issuance of any such certificates. Moreover, these letter certificates were (and still are) issued in very large numbers. Consumer representatives including The United Gas Improvement Company² and the Public Service Commission of the State of New York, who during this period were contesting the issuance of permanent certificates at out-of-line rate levels, likewise opposed the issuance of *temporary* certificates at equivalent out-of-line levels. These parties urged that whenever, pursuant to this Court's decision in *Atlantic Ref. Co. v. Public Service Comm'n*, 360 U. S. 378 (*Catco*) and other related decisions, the Commission conditioned a permanent certificate to a rate lower than that being collected under *ex parte* authority, it was necessary, in order to protect the consumer, also to condition the certificate upon

2. Under an agreement with the City of Philadelphia, The United Gas Improvement Company operates the municipally-owned Philadelphia Gas Works and related facilities. The Gas Works distributed 1035 Btu natural gas to some 600,000 customers in the City of Philadelphia.

refund of amounts already collected in excess of the legal conditioned rate level.

After formal hearing the prices collected under these temporary certificates were, in most instances, reduced to a lower level as a condition for permanent certification. These orders of the Commission granting permanent certificates reserved for future determination the question whether, as a further condition for the granting of the certificates, the producers should equitably be required to refund some or all of the unlawful excesses collected under temporary certificates.

The Commission received, from the producers involved, briefs containing offers of proof of equitable factors, urged as affecting the equitable requirement of refunds. Accepting these allegations as true, the Commission rejected the relevance of some and, recognizing the validity of others, ordered refund of *part* of the unlawful excesses. Producers appealed these orders to the Court of Appeals for the Tenth Circuit, which, on appeal from the Commission's original order deferring consideration of refunds, had recently ruled that the Commission lacked all power to order such refunds. The United Gas Improvement Company was granted intervention in the first appeal filed in the Court of Appeals, that of Sunray DX Oil Company. On March 27, 1967, the Court issued related *per curiam* orders vacating the orders of the Commission as they applied to Sunray DX and the other producers. The Court did not reach the producers' additional contention that, in any event, the ordering of refunds was inequitable in the circumstances of this case. The Court stated that it would not consider that issue until and unless this Court determined that the Commission had power at the threshold to order refunds.

REASONS FOR GRANTING THE WRIT.

The present case is an inseparable companion to that brought before the Court in Nos. 1133-35, this Term. In the order of which review is sought here, the Court of Appeals for the Tenth Circuit vacated orders of the Commission entered in the same proceeding as those for which review is sought in Nos. 1133-35, in express *per curiam* reliance upon its decision in that earlier case. It would be appropriate and in the interest of judicial economy for this Court to review the present decision as well and, if certiorari is granted, to consolidate the two cases for briefing and oral argument. The reasons for this are succinctly set forth at page 7 of the Solicitor General's brief for the Federal Power Commission in No. 1227 and those reasons are adopted here. In summary, the grant of certiorari here would enable this Court to resolve fully the issues of the existence of refund power in the Commission and its proper exercise, issues which have far reaching application beyond the particular Commission proceeding here under review. In our Petition in No. 1134, this Term, we pointed out that the rejection by the Court of Appeals of any refund power in the Commission is in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Public Service Comm'n v. FPC*, 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC*, 377 U. S. 963, and the rationale of this Court's decision in *United Gas Improvement Co. v. Callery Properties*, 382 U. S. 223. Moreover, this conflict causes serious administrative confusion, as the present case demonstrates, since an aggrieved party can apply to whichever Circuit has ruled favorably to its position and in the resulting confusion of law of the case the Commission could be rendered impotent to act in any direction.

CONCLUSION.

For the foregoing reasons it is urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

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